Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-979

WILLAMETTE IRON AND STEEL COMPANY,
Petitioner,

v.

SECRETARY OF LABOR AND OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit filed August 14, 1979.

OPINIONS BELOW

A copy of the Decision and Order of Jerry W. Mitchell, Administrative Law Judge, dated April 12, 1976, is attached as Appendix D, infra, A12. The Decision of the Occupational Safety and Health Review Commission, dated

January 11, 1978, reviewing that Decision and Order, is attached as Appendix C, infra, A7.

The Opinion of the Court of Appeals of August 14, 1979, dismissing Petitioner's Petition to Review the Decision of the Occupational Safety and Health Review Commission, is attached as Appendix A, infra, A1. It is reported at 604 F.2d 1177.

JURISDICTION

The Opinion of the Court of Appeals was filed August 14, 1979. Petitioner filed a timely petition for a rehearing and a suggestion for rehearing in banc, which was denied by order filed September 26, 1979. A copy of the order denying that petition is attached as Appendix B, infra, A6. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 and 29 U.S.C. § 660(a).

QUESTIONS PRESENTED

This litigation presents the following two questions affecting the administration and interpretation of the Occupational Safety and Health Act of 1970 ("Act"):

1. Whether an order of the Occupational Safety and Health Review Commission ("Commission") is "official action" as that term is used in 29 U.S.C. § 661(e), reviewable as provided in 29 U.S.C. § 660(a), where no two commissioners agree upon the rationale for that order.
2. Whether an employer may be held to have "repeatedly" violated the Act's requirements, as that term is used in 29 U.S.C. § 666(a), upon proof which shows nothing more than that the employer violated the same regulation twice.

STATUTES INVOLVED

1. 29 U.S.C. § 661(e) reads as follows:

   "For the purpose of carrying out its functions under this chapter, two members of the Commission shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members."

2. 29 U.S.C. § 660(a) reads in relevant part as follows:

   "Any person adversely affected or aggrieved by an order of the Commission issued under subsection (c) of section 659 of this title may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit, by filing in such court within sixty days following the issuance of such order a written petition praying that the order be modified or set aside."

3. 29 U.S.C. § 666(a) provides as follows:

   "Any employer who wilfully or repeatedly violates the requirements of section 654 of this title, any standard, rule, or order promulgated pursuant to section 655 of this title, or regulations prescribed pursuant to this chapter may be assessed a civil penalty of not more than $10,000 for each violation."

STATEMENT OF THE CASE

On September 16, 1975, an inspection was conducted by a representative of the Secretary of Labor ("Secretary") aboard the vessel "New Yorker" at Petitioner's place of employment at Swan Island ship repair yard, Portland, Oregon. That vessel was undergoing repairs by Petitioner. an employer engaged in the ship repair industry. That

inspection resulted in issuance of Citation No. 2, alleging violation of the "housekeeping" standard, 29 CFR § 1915.51(a). The citation further alleged that the violation was "repeated non-serious". Petitioner contested the citation. The case was submitted to Administrative Law Judge Mitchell upon a record consisting of the Secretary's Complaint, Petitioner's Answer, and a stipulation by which Petitioner admitted the relevant facts alleged by the Secretary. The Administrative Law Judge's "Decision and Order" (Appendix D, infra, A12) held that the citation had properly alleged a "repeated" violation, because a similar violation had occurred nearly three years earlier aboard a different vessel. A monetary penalty was assessed.

Discretionary review was thereupon granted by the Commission which on January 11, 1978, rendered its "Decision" (Appendix C, infra, A7). Two Commissioners* concurred in imposing a lesser penalty than that assessed by the Administrative Law Judge, but agreed to disagree on the issue whether the violation should be classified as "repeated". They did, however, agree to affirm that portion of the Administrative Law Judge's decision "and accord it the precedential value of an unreviewed judge's decision." (Appendix C, infra, A7).

Petition for Review was filed with the Court of Appeals for the Ninth Circuit March 3, 1978, pursuant to 29 U.S.C. § 660(a). On August 14, 1979, the Court filed its Opinion (Appendix A, infra, A1), concluding that it was without jurisdiction to review the Commission's order. The Court reasoned that the failure of the two Commissioners to agree upon the characterization of the offense required the conclusion that no "official action" had been taken and that the Commission had not entered a reviewable order. The

*While Section 12(a) of the Act (29 U.S.C. § 661(a)) established a three member Commission, on the date of the decision there were but two incumbents.

issue whether the offense was "repeated" was not reached by the Court, which dismissed the Petition for Review. A petition for rehearing and a suggestion for rehearing in banc was denied and rejected by an Order of the Court filed September 26, 1979 (Appendix B, infra, A6).

REASONS FOR ALLOWING THE WRIT

Courts of Appeals have rendered conflicting decisions on both issues raised by this litigation.

1. In the instant case, as well as in the earlier Ninth Circuit case of *Cox Bros., Inc., v. Secretary of Labor,* 574 F.2d 465 (9th Cir. 1978), and in the case of *Shaw Construction, Inc., v. OSHRC,* 534 F.2d 1183 (5th Cir. 1976), it has been held that decisions by the Commission affirming a hearing officer's decision by a one-to-one vote do not present orders reviewable under 29 U.S.C. § 660(a). However, in the case of *George Hyman Construction Co. v. OSHRC,* 582 F.2d 834 (4th Cir. 1978), the court refused to follow *Shaw Construction* and held an order of the Commission to be reviewable, notwithstanding disagreement among the Commissioners concerning the rationale for their decision.
2. The meaning of the word "repeatedly" as used in 29 U.S.C. § 666(a) has been understood differently by Courts for the Third Circuit on the one hand, and those for the Ninth and Fourth Circuits on the other. The Court for the Third Circuit held, in the case of *Bethlehem Steel Corporation v. OSAHRC and Brennan,* 540 F.2d 157 (3rd Cir. 1976), that the Secretary of Labor does not prove a "repeated" violation on a showing consisting exclusively of proof of a subsequent offense similar to an earlier one. On the other

hand, in the case of *Todd Shipyards Corporation v. Secretary of Labor,* 586 F.2d 683 (9th Cir. 1978), and *George Hyman Construction Co. v. OSHRC,* supra, the Secretary has been authorized to prove a "repeated" offense on the basis of such evidence.

The Occupational Safety and Health Act of 1970 is major legislation, affecting virtually all employers and employees in the nation in their daily work. The bar, employers, employees and their representatives, the Commission and the Courts are all in need of definitive interpretation of the requirements of the Act in the particulars presented by this litigation. Without such an interpretation, the law will be differently applied within the various Circuits, with attendant confusion and tension. The conflict should be settled and the law declared by action of this Court.

Further, justice to this Petitioner requires allowance of the Writ. The Court below has ordered dismissal of Petitioner's Petition for Review, but without specific remand, thereby committing Petitioner to a jurisdictional limbo. Is the matter to be returned to the Commission for further review of the Administrative Law Judge's decision? If no such review is undertaken, is the Secretary then authorized to enforce collection of the penalty found appropriate by the two Commissioners, or possibly the greater penalty found proper by the Administrative Law Judge? If the Secretary proceeds by civil action pursuant to 29 U.S.C. § 666(k) to enforce one or the other of these penalties, could Petitioner obtain review of the Commission's action in that proceeding? If not, what has become of the employer's right of review conferred by 29 U.S.C. § 660(a)? Resolution of these uncertainties and fairness to this Petitioner likewise require this Court to issue the writ.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

JAMES C. INGWERSEN
Counsel for Petitioner

Appendix A

FILED—Aug 14 1979
Emil E. Melfi, Jr. Clerk
U. S. Court of Appeals

United States Court of Appeals
for the Ninth Circuit

No. 78-1494

OPINION

WILLAMETTE IRON AND STEEL COMPANY,
Petitioner,

vs.

SECRETARY OF LABOR AND OCCUPATIONAL SAFETY AND HEALTH COMMISSION,
Respondent.

Petition to Review a Decision of the Secretary of Labor and Occupational Safety and Health Review Commission

Before: WALLACE and SNEED, Circuit Judges, and BLUMENFELD,* District Judge.

WALLACE, Circuit Judge:

Willamette Iron and Steel Co. (Willamette) petitions for review of an order of the Occupational Safety and Health Review Commission (Commission). Willamette attacks only the portion of the Commission order affirming the hearing officer's determination that it had committed "repeated" violations of the Occupational Safety and Health Administration regulations. We have determined that as

*Honorable M. Joseph Blumenfeld, United States District Judge, District of Connecticut, sitting by designation.

to that issue we are without jurisdiction. Therefore, we dismiss the petition.[1]

I

The parties stipulated to the facts. Willamettee was first cited for violating the Occupational Safety and Health Administration's (OSHA) housekeeping standard, 29 C.F.R. § 1915.51(a), on December 8, 1972, while repairing the vessel NAECO at the company's Swan Island dry dock facility in Portland, Oregon. The citation, which became final when Willamette failed to contest it, 29 U.S.C. § 659(a), alleged that Willamette had failed to elevate or cover various hoses and welding leads on the vessel's weatherdeck.

On September 24, 1975, authorized representatives of the Secretary of Labor issued three further citations against Willamette for alleged violations of various OSHA regulations. The company did not contest one of these citations, and the Secretary of Labor later withdrew another by stipulation. Thus, the controversy here centers on the Secretary's third citation which was for a "repeated non-serious" violation of the housekeeping standard. This citation alleged that on September 16, 1975, a routine inspection of the vessel NEW YORKER at the Swan Island facility had revealed that the vessel's maindeck walkways and working areas were cluttered with air hoses, electrical cords, welding leads, and debris. Pursuant to stipulation, Willamette did not contest the existence of the conditions leading to the September 24 citation, but only the characterization of the violation as "repeated."

Willamette gave appropriate notice of intent to contest the citation and the Secretary of Labor filed a complaint

1. Neither the Secretary of Labor nor Willamette quarrels with the Commission's ruling that Willamette had committed a non-serious violation, or with the Commission's assessment of a $200 penalty for this violation. Since these rulings are not attacked, we refrain from expressing any view on either our jurisdiction to review them or their merits.

with the Commission. After a hearing, a hearing officer concluded that the citation had been properly characterized as "repeated."

Willamette then brought a petition for discretionary review before the Commission. It raised numerous contentions in support of its argument that its violation was not repeated. The two Commission members who reviewed the case divided on this question. One felt that the violation was properly labeled "repeated"; the other disagreed. The Fifth Circuit had already decided, in *Shaw Constr., Inc. v. OSHRC,* 534 F.2d 1183, 1185-86 (5th Cir. 1976), that a purported affirmance of a hearing officer's decision by a divided, one-to-one vote was not final, "official" Commission action. In an effort to resolve the impasse, and perhaps with *Shaw* in mind, the two commissioners agreed to "affirm" the hearing officer's decision in this case regarding classification of the violation as "repeated," but to accord this portion of his ruling only the precedential value of an unreviewed hearing officer's decision. The mandate of the Commission decision was simply that the hearing officer's ruling was "affirmed."

Before us, Willamette once again argues that the hearing officer mistakenly characterized the violation as "repeated." Because we decide that we do not have jurisdiction over this issue, we do not reach the merits of this contention.

II

In *Cox Bros., Inc. v. Secretary of Labor,* 574 F.2d 465 (9th Cir. 1978), we agreed with *Shaw, supra,* and held that a purported affirmance of an administrative hearing officer's decision by an equally divided Commission was not official action of the Commission, reviewable by this court, because it was supported by the affirmative vote of only one member. *Id.* at 467. We reasoned that 29 U.S.C. § 661(e) required an affirmative vote of two Commission members

before an affirmance of a hearing officer's decision could be considered reviewable official action. *Id.*

The parties argue, however, that the case before us is distinguishable from *Cox Brothers* because *both* commissioners who reviewed the hearing officer's decision agreed to affirm. At first blush this appears to be true. Yet, by according the hearing officer's ruling the precedential value of an unreviewed decision, the Commission has given its action the same practical effect as the Commission's unreviewable action in *Cox Brothers*. The Commission cannot have it both ways. Either it affirms the hearing officer's decision and the Commission's ruling has the precedential value of a *Commission ruling,* or the Commission has not officially affirmed the hearing officer's decision. In both *Cox Brothers* and this case, the hearing officer's decision is left as the only authoritative disposition[2].

Since we are concerned with our jurisdiction, we must look to the practical effect of the two commissioners'

2. The two commissioners cited the case of *Life Science Prods. Co.,* 77 OSAHRC 200/A2, 1977-78 OSHD (CCH) ¶ 22,313 (No. 14910, 1977), *aff'd sub nom. Moore v. OSHRC,* 591 F.2d 991 (4th Cir. 1979), as an explanatory authority for the action they took in this case. There, the same two commissioners responsible for the ruling in this case had split on the correctness of the hearing officer's decision and attempted there, too, to avoid an impasse by "affirming" but according the hearing officer's decision "the plus credential (sic) value of an unreviewed . . . decision." 1977-78 OSHD (CCH) ¶ 22,313, at 26,871 (footnote omitted). The commissioners explained that since they both had cast votes to affirm the hearing officer's decision, they did not have to decide whether to follow *Shaw Construction, Inc. v. OSHRC,* 534 F.2d 1183 (5th Cir 1976). *Id.* at 26,870 n.3. They cited cases where courts have approved the conduct of administrative commissioners in voting against their personal views to avoid an impasse. *See, e.g., Public Serv. Comm'n v. FPC.* 543 F.2d 757, 777 (D.C. Cir. 1974), *cert. denied,* 474 U.S. 910 (1976). When the attempt to avoid an impasse has exactly the same practical effect as an unreviewable split vote, we do not believe those cases are helpful.

actions. The label placed upon the determination made by the two commissioners is not alone determinative, "for it is the substance of what the Commission has purported to do and has done which is decisive," *Columbia Broadcasting Sys., Inc. v. United States,* 316 U.S. 407, 416 (1942). Because the two commissioners agreed to accord the purportedly "affirmed" decision of the hearing officer only the precedential value of an unreviewed decision, the "dissenting" commissioner did not truly vote to affirm. As the Commission made clear in *Leone Constr. Co.,* 76 OSAHRC 12/E6, 1975-76 OSHD (CCH) ¶ 20,387 (No. 4090, 1976), a hearing officer decision which lacks full Commission review does not constitute precedent binding upon the Commission. An unreviewed decision also does not "necessarily [express] the views of the Commissioners, or [declare] Commission policy." 1975-76 OSHD (CCH) ¶ 20,387, at 24,322. Yet a true affirmance by the Commission of a hearing officer decision would, of course, act as binding precedent and would be declarative of Commission policy. If *Cox Brothers* means anything, our response to the commissioners' actions in this case must be the same as our response there.[3] We therefore dismiss the petition.

PETITION DISMISSED.

3. Willamette suggests that in this case there was an "adjudication" by the Commission, while there was none in *Cox Brothers.* The key issue which the parties placed before the Commission in this case was whether the violation was repeated. There was no true agreement or adjudication *by the Commission* on that question in this case any more than there was in *Cox Brothers.* That the commissioners did agree that a violation had occurred and also were able to agree on the penalty to be assessed does not change that fact. Indeed, while purporting to affirm the finding that the violation was repeated, the commissioners stated that, "[s]ince the Commission members are divided on how the violation should be classified, the stipulations of the parties [regarding assessment of a penalty] cannot be honored." The commissioners then assessed a penalty of $200, the amount to which the parties had stipulated in the event that the violation was adjudged to be *non*-repeated.

Appendix B

FILED—Sep 26 1979
Emil E. Melfi, Jr. Clerk
U. S. Court of Appeals

United States Court of Appeals
for the Ninth Circuit

No. 78-1494

ORDER

WILLAMETTE IRON AND STEEL COMPANY,
Petitioner,

vs.

SECRETARY OF LABOR AND OCCUPATIONAL SAFETY AND HEALTH COMMISSION,
Respondent.

Before: WALLACE and SNEED, Circuit Judges, and BLUMENFELD,* District Judge

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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*Honorable M. Joseph Blumenfeld, United States District Judge, District of Connecticut, sitting by designation.

Appendix C

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

OSHRC Docket No. 15317

SECRETARY OF LABOR,
Complainant,

v.

WILLAMETTE IRON AND STEEL COMPANY,
Respondent.

DECISION

Before CLEARY, Chairman; BARNAKO, Commissioner.

BY THE COMMISSION:

The primary issue is whether Respondent (Willamette) "repeatedly" violated the housekeeping standard at 29 C.F.R. 1915.51(a) by violating that standard on one ship at its dry dock facilities in 1972 and on another ship at the same location in 1975. Judge Jerry W. Mitchell held that the company did commit a repeated violation, and assessed a $400 penalty. The secondary issue is whether that penalty should be modified. Chairman Cleary would affirm the Judge's categorization of the violation as repeated. Commissioner Barnako would find that the violation was nonserious, but not repeated. Both Commission members agree that a $200 penalty is appropriate and modify the penalty to that amount. To resolve their impasse on the classification of the citation, however, the Commission members agree to affirm that portion of the judge's decision and accord it the precedential value of an unreviewed judge's decision. See *Life Science Products Company,* 77 OSAHRC 200/A2, 6 BNA OSHC 1053, 1977-78 CCH OSHD para. 22,313 (No. 14910, 1977).

The parties stipulated to the facts. Willamette was first cited for violating the standard[1] on December 8, 1972 while repairing the ship NAECO at the company's Swan Island dry dock facility in Portland, Oregon. The citation alleged that hoses and welding leads on the vessel's weatherdeck were not elevated or covered; the citation became a final order of the Commission after Willamette failed to contest it.[2]

The company was issued the repeated citation on September 24, 1975 after an inspection of the vessel NEW YORKER at the Swan Island facility; the citation alleges that the vessel's maindeck walkways and working areas were cluttered with air hoses, welding leads, electrical cords, and debris. The allegations are admitted by the company. Although the records do not disclose whether the work crews employed on the NEW YORKER were the same as those employed on the NAECO, the same labor crafts under the same management supervision were employed at both times.

Willamette contends that: 1) a repeated violation was not proven because the evidence fails to show a flaunting of the Act's[3] requirements; 2) a repeated violation was not

1. The standard at 1915.51(a) reads:
Good housekeeping conditions should be maintained at all times. Adequate aisles and passageways shall be maintained in all work areas. All staging platforms, ramps, stairways, walkways, aisles, and passageways on vessels or dry docks shall be kept clear of all tools, materials, and equipment except that which is in use, and all debris such as welding rod tips, bolts, nuts, and similar material. Hose and electrical conductors shall be elevated over or placed under the walkway or working surfaces or covered by adequate crossover planks.

2. 29 U.S.C. 659(a).

3. The Occupational Safety and Health Act of 1970, 29 U.S.C. Sec. 651 *et seq.*, referred to throughout this decision as the "Act."

proven because the evidence fails to establish that the 1972 and 1975 violations involved substantially identical circumstances; 3) a repeated violation cannot be found where nearly three years intervene between two violations; 4) the present citation lacks the particularity required by Section 9(a)[4] of the Act because it does not identify the 1972 citation as the basis for the repeated allegation; 5) the procedures of the Secretary under the Act violated Willamette's rights under Article III, Section 2, and the Fourth, Fifth, Sixth, and Seventh Amendments to the Constitution.

The views of Commissioner Barnako and Chairman Cleary on repeated violations are stated in *George Hyman Construction Co.*, 77 OSAHRC 67/C7, 5 BNA OSHC 1318, 1977-78 CCH OSHD para. 21,774 (No. 13559, 1977), appeal docketed, No. 77-1591 (4th Cir., May 2, 1977). Commissioner Barnako agrees with Willamette that the violation was not repeated. A repeated violation requires facts establishing that Willamette disregarded the requirements of 1915.51(a) after receiving the 1972 citation. Although an identity of management supervision may frequently show a company's disregard for the requirements of a standard, the identity of supervision here is not dispositive because of the nature of the violation cited. Housekeeping problems are recurrent ones for ship repair companies. It is not always possible, even with diligent effort, to maintain good housekeeping aboard ship. The fact that Willamette was cited for violating the same housekeeping standard twice

4. Section 9(a) reads, in pertinent part:
. . . Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated . . .

in some three full years does not indicate that the company disregarded the standard after receiving the 1972 citation.

Chairman Cleary finds that the violation is repeated. He rejects Willamette's contention that the Secretary must prove a repeated violation by showing that the company flaunted the Act's requirements. He also disagrees with the company's contention that the circumstances of the two violations must be substantially identical for the second violation to be repeated. Chairman Cleary finds the violation repeated because the standard first violated in 1972 was again violated in 1975 at the same shipyard. See *Bethlehem Steel Corp.*, 75 OSAHRC 83/C12, 3 BNA OSHC 1520, 1975-76 CCH OSHD para. 19,996 (No. 8392, 1975), rev'd 540 F.2d 157 (3rd Cir. 1976). In Chairman Cleary's opinion the three-year interval between violations does not affect the classification of the violation as repeated, but he considers the interval significant in assessing a penalty.

Both Commissioner Barnako and the Chairman reject Willamette's argument that the present citation is not sufficiently particular. The citation adequately describes the nature of the violation and contains a reference to the standard at 1915.51(a). The complaint specified the date of the inspection that preceded issuance of the 1972 citation, as well as the name of the vessel involved in that inspection. We find that the citation and complaint provided Willamette with sufficient notice of the nature of the alleged violation. *Todd Shipyards Corp.*, 77 OSAHRC 74/F14, 5 BNA OSHC 1012, 1976-77 OSHD para. 21,509 (No. 8500, 1977). As for the constitutional issues, the Commission does not have the authority to decide them. See *Buckeye Industries, Inc.*, 75 OSAHRC 21/B3, 3 BNA OSHC 1837, 1975-76 CCH OSHD para. 20,239 (No. 8454, 1975).

The Secretary of Labor argues that Judge Mitchell erred in assessing a penalty of $400. The Secretary contends that the parties stipulated to the appropriateness of a $780 penalty, and that the Judge did not have the authority to alter that amount. The Commission, however, is not bound to assess a stipulated penalty, although it will normally do so. *Thorleif Larsen & Son of Indiana, Inc.*, 74 OSAHRC 74/C8, 2 BNA OSHC 1256, 1974-75 CCH OSHD para. 18,826 (No. 370, 1974). Further, the parties in this case stipulated to different penalties for different classifications of violations. They stipulated to $780 for a repeated violation and $200 for a nonserious violation. Since the Commission members are divided on how the violation should be classified, the stipulations of the parties cannot be honored. Instead, the Commission members will use their authority to assess penalties without regard to the stipulations.

Commissioner Barnako and Chairman Cleary agree that a $200 penalty is appropriate. They find the gravity of the violation to be moderate in that housekeeping problems were evident throughout the ship. Also, the three-year interval between violations indicates that Willamette did not demonstrate bad faith in violating the same standard a second time.

Accordingly, the Judge's ruling that the 1915.51(a) violation was repeated is affirmed. A penalty of $200 is assessed.

FOR THE COMMISSION
RAY H. DARLING, JR.
Ray H. Darling, Jr.
Executive Secretary

DATE: JAN 11 1978

Appendix D

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

DECISION AND ORDER
OSAHRC DOCKET NO. 15317

SECRETARY OF LABOR

Complainant,

v.

WILLAMETTE IRON AND STEEL COMPANY

Respondent.

STATEMENT OF THE CASE

Jerry W. Mitchell, Judge

This is a proceeding pursuant to Section 10 of the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651 *et seq.*) contesting two allegedly repeated nonserious Citations issued by the Secretary of Labor (Complainant) against Willamette Iron and Steel Company (Respondent) under the authority vested in Complainant by Section 9(a) of the Act.

A place of business and employment owned and operated by Respondent, described as "Aboard vessel 'New Yorker' on dry dock No. 2" located at Swan Island ship repair yard, Portland, Oregon was inspected by a representative of the Secretary of Labor on September 16, 1976. During that inspection 14 instances of alleged violation of three specific safety standards were noted. As a result of the inspection Citation Number One (Nonserious, 1 Item), Citation Number Two (Repeated Nonserious, 1 Item involving 12 instances of violation) and Citation Number Three (Repeated Nonserious, 1 Item) were issued to Respondent on September 24, 1975. The standards allegedly violated were promulgated by the Secretary of Labor pursuant to Section 6 of the Act and are now codified at Title 29, Code of Federal Regulations at 1915.36(b)(4), 1915.51(a) and 1915.52(b)(3), respectively.

The violation alleged in Citation Number One describes an electric welding lead in poor repair with a bare conductor exposed due to damaged insulation. The violation alleged in Citation Number Two involves 12 instances of failure to maintain good housekeeping standards. The violation alleged in Citation Number Three involves the exposure of electric light cords to damage in the walkways and work areas on the main deck of the vessel.

Pursuant to the enforcement procedure provided in Section 10(a) of the Act, Respondent was duly advised by a Notification of Proposed Penalty dated September 24, 1975 of the proposal to assess penalties of $0, $1560, and $200 in connection with the respective Citations. Respondent filed a letter dated October 9th contesting Citations Numbers Two and Three and stating that the violation covered by Citation Number One was abated on the day of the inspection. A complaint was filed and answered and the case set for trial. A week before the trial the parties advised that the factual issues involved here had been settled by stipulation. At the same time the parties sought opportunity to brief the issue of whether Citation Number Two is a "repeated" violation. Accordingly, the pending trial was cancelled.

In a Stipulation executed on January 19, 1976 the parties advise, propose and agree as follows:

1. Complainant moves to amend its complaint by striking references to the violation described in Cita-

tion Number Three as well as references to the corresponding penalty. Complainant also moves to withdraw Citation Number Three and strike the reference to a penalty for that Citation which appears on the Notification of Proposed Penalty;

2. Complainant moves to amend its complaint and the Notification of Proposed Penalty so as to assess a penalty of $780 in connection with Citation Number Two;

3. Respondent does not dispute the existence of the conditions described in Citation Number Two;

4. Based on Complainant's concessions Respondent moves to amend its answer so as to admit the allegations of the amended complaint EXCEPT for the allegation that Citation Number Two is a "Repeated" Citation;

5. The parties stipulate that a Citation and a Notification of Proposed Penalty issued to Respondent on December 8, 1972 following a November 13, 1972 inspection aboard the vessel NAECO, while she lay at the same Swan Island ship repair dry dock facility as that involved here, have become final orders of the Review Commission without contest by Respondent;

6. The parties agree that the records do not disclose whether the work crews employed aboard NAECO on November 13, 1972 were composed of the same individuals as were working aboard NEW YORKER on September 16, 1975. The parties *DO* stipulate that the same labor crafts under the same management supervision were employed on both occasions;

7. The parties also stipulate that if it should be found that Citation Number Two should be properly characterized as "Nonserious" rather than "Repeated"

then a penalty in the amount of $200 is appropriate; and that

8. The Stipulation was posted pursuant to Rule 7 on or before January 19, 1976.

DISCUSSION

CITATION NUMBER TWO IS A "REPEATED NONSERIOUS" VIOLATION

Complainant characterizes the violation described in Citation Number Two as "Repeated Nonserious" and captions the Citation accordingly. This characterization is based on the fact that Respondent admittedly has been cited on a previous occasion for violation of the same safety standard, 29 CFR 1915.51(a), as is the basis for this proceeding. The previous inspection and citation are stipulated to. It is also stipulated that the previous citation has become a final order of the Review Commission because Respondent did not contest it.

Respondent argues that the instant Citation should not be characterized as "repeated". Respondent admits that the violative conditions existed at the time of the inspection on September 16, 1975 but argues that those conditions constituted a "nonserious" violation—not a "repeated" violation. Respondent raises 4 points in support of its argument and urges that the circumstances of the two violations differ materially and thus the instant violation is not a "repeated" violation.

1. The first violation was found during an inspection on November 13, 1972 and the instant violations during an inspection on September 16, 1975. The time lapse between the 2 violations is thus nearly 3 years.

2. There is no showing that the work crews employed at the time of each inspection were the same

individuals. NOTE: The parties stipulate that "... the same crafts *under the same management supervision* were employed on both occasions." (Emphasis added.)

3. Two different work places are involved—the vessel NAECO in 1972 and the vessel NEW YORKER in 1975. NOTE: The parties stipulate that each of these vessels were laying at the same Swan Island ship repair dry-dock facility of Respondent in the Port of Portland, Oregon at the time of the respective inspections.

4. The 1972 Citation describes a violation localized on the weather deck of NAECO while the instant Citation describes a more generalized situation with violations of the standard observed at several different locations aboard NEW YORKER.

Consolidating the similarities of the situations existing at the time of the 2 inspections will demonstrate why Respondent's argument must fail. Each of the 2 vessels involved was laying at the same repair facility of Respondent at the time of the respective inspections. The same labor crafts were working at the time of each inspection and the work was being performed *under the same management supervision* in each instance. The identical safety standard was cited and admittedly violated in each instance. The violation *admittedly* existing on each occasion exposed the employees to the same tripping hazards posed by the same instrumentalities—welding leads and hoses. The violations were much more widespread on NEW YORKER than on the first occasion of violation aboard NAECO but this does not alter the similarities of the 2 situations. It only expands the exposure on this second

occasion. Under all of these facts it must be concluded that the work sites involved in the two instances are sufficiently similar as to justify the classification of the violation aboard NEW YORKER as being "repeated". See *Secretary v. Bethlehem Steel Corporation,* OSAHRC Docket No. 8392 (September 17, 1975).

The other point under this attack on the similarities of the 2 situations is based upon the lapse of nearly 3 years between the 2 inspections. There is no provision in the Act with respect to any period of time required between 2 violations so as to allow them to be classed as "repeated". Nor is there any limitation on how much time may pass between 2 inspections before the second violation can not be classified as "repeated". It would appear that the only requirement is that the violations be of the same standard under conditions at worksites which are related by sufficient similarities as to give the employer knowledge of the previous violation. Under such circumstances the previous violation and citation should alert the employer to the conditions which constitute a violation and thereby provide him the opportunity to be on special guard against recurrence of that particular violation. Here the same "management supervision" is involved in both cases of violation of the same standard. This alone is a sufficient connection of the 2 violations to justify classification of the September 16, 1975 violation as "repeated".

Respondent also argues that since "the record does not support a finding of careless or intentional flaunting of the requirements of the act" the instant violation is not repetitive. This argument, based primarily on *Secretary v. General Electric Company, Inc.,* 17 OSAHRC 49 (1975), has been rejected by the Review Commission in *Bethlehem Steel Corporation,* supra. That reversal is expressed in the

following language, "... there is no language in the Act or its legislative history indicating that a second violation must result from any particular state of the employer's mind in order to be a repeated violation within the meaning of Section 17(a)." The Commission has also held that noncompliance with a standard at one worksite may be the basis for a finding of "repeated" violation when followed by a citation for noncompliance with the same standard at a different worksite. See *Bethlehem Steel Corporation* and *General Electric Company, Inc.,* supra.

The foregoing discussion of the various arguments and issues raised by Respondent leads to the conclusion that Complainant's classification of the instant Citation as "repeated" is valid. That is the conclusion reached here.

APPROPRIATE PENALTY

In determining the appropriateness of any penalty assessed in connection with this proven "repeated nonserious" violation it is necessary to give due consideration to the criteria (size of business, good faith, gravity, and history) set forth in Section 17(j) of the Act.

1. Respondent is a fairly large ship repair company with at least 168 employees admittedly exposed to the admitted instances of violation. All of them were exposed to the hazards aboard NEW YORKER.

2. There is no evidence in this stipulated record with respect to the existence of or the extent of any safety program which Respondent has instituted at this worksite.

3. Welding leads, air hoses, a water hose and other material and debris was found at 12 different locations about NEW YORKER at the time of the inspection. The tripping hazards were thus rather widespread, exposing all who moved about the vessel. Gravity is therefore moderate.

4. Respondent has been inspected on at least one previous occasion and found to be in admitted violation of the same standard as was violated on this occasion.

It is also noted that the parties have stipulated that a penalty of $200 would be appropriate in this instance if the present violation is found to be "nonserious" rather than "*repeated* nonserious". Giving due consideration to all of the factors involved here, including the repetitive nature of this violation, it is considered that a penalty of $400 is appropriate in this instance. This conclusion also takes into account the fact that nearly 3 years have elapsed since the first citation.

Consequently, based upon the stipulated record and the briefs submitted, we make the following:

FINDINGS OF FACT

1. On September 16, 1975 and at all times material hereto Willamette Iron and Steel Company, Respondent herein, was engaged in the business of ship repair. On that date at least 168 of Respondent's employees were working in and about the vessel NEW YORKER while she lay at Respondent's Swan Island ship repair dry-dock facility at Portland, Oregon. (Complaint, Articles I, II, III and IV; admitted by Respondent in the Stipulation.)

2. An inspection conducted aboard the vessel NEW YORKER on September 16, 1975 by a representative of the Secretary of Labor revealed 12 instances of Respon-

dent's failure to maintain good housekeeping conditions on that vessel. Each of the instances were as described in Citation Number Two. (File; Complaint, Article IV: admitted by Respondent in the Answer and Stipulation.)

3. As a result of the September 16th inspection 3 Citations were issued to Respondent on September 24, 1975. A Notification of Proposed Penalty issued to Respondent on that same date sought penalties of $0, $1560, and $200 for Citations Numbers One, Two and Three, respectively. Citations Numbers Two and Three were classified as "repeated". On October 9th Respondent contested Citations Numbers Two and Three and advised that the violation covered by Citation Number One had been corrected on the day of the inspection. (File.)

4. The parties hereto executed a Stipulation on January 19, 1976. Said Stipulation was posted at Respondent's workplace pursuant to Rule 7 at a date prior to January 19th. In the Stipulation Complainant moved to amend its complaint so as to strike all reference to Citation Number Three and moved to withdraw Citation Number Three and its corresponding proposed penalty of $200. Complainant also moved to amend its complaint and Notification of Proposed Penalty so as to reduce the penalty sought in connection with Citation Number Two from $1560 to $780. Respondent thereupon admitted the existence of the conditions described in Citation Number Two and moved to amend its answer so as to admit the allegations of the amended complaint except for the allegation that Citation Number Two was a "repeated' violation. (Stipulation.)

5. On November 13, 1972 a worksite aboard the vessel NAECO under the operation and control of Respondent was inspected by a representative of the Secretary of

Labor. On that date NAECO was laying at the same Swan Island ship repair dry-dock facility as was NEW YORKER on September 16, 1975. On November 13, 1972 Respondent failed to maintain good housekeeping conditions aboard NAECO in violation of the safety standard found at 29 CFR 1915.51(a). A citation covering the violation of 29 CFR 1915.51(a) aboard NAECO was issued to Respondent on December 8, 1972. Respondent did not contest the citation. Said citation became a final order of the Review Commission pursuant to Section 10(a) of the Act. (Stipulation.)

6. The same labor crafts under the same management supervision were employed aboard NAECO on November 13, 1972 and aboard NEW YORKER on September 16, 1975. (Stipulation.)

From the foregoing Findings of Fact we now make and enter the following:

CONCLUSIONS OF LAW

1. At all times material hereto Willamette Iron and Steel Company, Respondent herein, was an employer engaged in the ship repair industry in a business affecting commerce within the meaning of Section 3 of the Occupational Safety and Health Act of 1970. On October 16, 1975 Respondent filed a letter contesting Citations Numbers Two and Three herein. Respondent thereby brought itself and the subject matter of this proceeding within the jurisdiction of the Occupational Safety and Health Review Commission pursuant to Section 10 of the Act.

2. Respondent's admitted failure to comply with the housekeeping requirements of the safety standard codified at 29 CFR 1915.51(a), as found in Finding 2, is a nonserious violation of that particular safety standard. The same

safety standard had ADMITTEDLY been violated by Respondent aboard another vessel at the same location on a previous occasion. The instant violation is, therefore, a "Repeated Nonserious" violation of the safety standard codified at 29 CFR 1915.51(a) and is a violation of Section 5(a)(2) of the Act.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and for good cause shown, it is *ORDERED* that:

1. Complaintant's motion to amend its complaint and Notification of Proposed Penalty by striking all reference to Citation Number Three and to withdraw Citation Number Three be, and the same hereby is, GRANTED and Citation Number Three is hereby VACATED;

2. Respondent's motion to amend its answer so as to admit the allegations of the amended complaint except for the allegation that Citation Number Two is a "repeated nonserious violation" be, and the same hereby is, GRANTED;

3. Repeated Nonserious Citation Number Two be, and the same hereby is, AFFIRMED; and that

4. The penalty of $1560 originally proposed in connection with Citation Number Two and subsequently amended to $780 be further modified to $400 and as so modified be, and the same hereby is, ASSESSED.

Dated this 12th day of April 1976.

JERRY W. MITCHELL
Jerry W. Mitchell
Judge

Supreme Court, U.S.
FILED
FEB 29 1980
MICHAEL RODAK, JR., CLERK

No. 79-979

In the Supreme Court of the United States

OCTOBER TERM, 1979

WILLAMETTE IRON AND STEEL COMPANY, PETITIONER

v.

RAY MARSHALL, SECRETARY OF LABOR AND OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is reported at 604 F. 2d 1177. The opinion of the Occupational Safety and Health Review Commission (Pet. App. 7-11) is reported at 1977-1978 Occup. Safety & Health Dec. (CCH) para. 22,482. The opinion of the administrative law judge (Pet. App. 12-22) is summarized at 1976-1977 Occup. Safety & Health Dec. (CCH) para. 20,702.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1979, and a petition for rehearing was denied on September 26, 1979 (Pet. App. 6). The petition for a

writ of certiorari was filed on December 21, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a decision of the Occupational Safety and Health Review Commission, supported by the votes of two Commissioners, to affirm a decision of an administrative law judge but to give the affirmance the precedential value of an unreviewed administrative law judge's decision is a final "official action" by the Commission within the meaning of 29 U.S.C. 661(e).

2. Whether, in the circumstances of this case, petitioner's violation of a safety standard was "repeated" within the meaning of 29 U.S.C. 666(a).

STATEMENT

Petitioner maintains a worksite at the Swan Island Ship Repair Yard in Portland, Oregon, where it employs a regular work force to repair incoming vessels throughout the year (Pet. App. 12). On December 8, 1972, the Secretary of Labor cited petitioner for a violation of a safety standard issued under the Occupational Safety and Health Act of 1970 occurring at this site during the repair of the vessel NAECO. The citation, issued pursuant to 29 U.S.C. 658(a), alleged that petitioner allowed exposed hoses and welding leads on the vessel's weatherdeck, in violation of the Secretary's standard requiring employers to maintain good housekeeping conditions and to keep working surfaces clear of hoses and electrical conductors. See 29 C.F.R. 1915.51(a). When petitioner failed to contest the citation within 15 days, it became a final order of the Occupational Safety and Health Review Commission not subject to further review (Pet. App. 8, 14; 29 U.S.C. 659(a)).

Some 34 months later, in September 1975, a Department of Labor inspector conducted a routine inspection of petitioner's facility and discovered numerous instances of petitioner's failure to comply with the same safety standard. Aboard the vessel NEW YORKER, the inspector observed 12 separate areas where the walking and working surfaces for employees were cluttered with hoses, welding leads, electrical cords and other material (Pet. App. 8, 13). It was undisputed that these conditions existed in areas where the same labor crafts had worked on the vessel NAECO in 1972 and that the same management supervisors had worked on both ships (Pet. App. 8, 16).

The Secretary subsequently issued a citation alleging that the conditions on the NEW YORKER violated 29 C.F.R. 1915.51(a) and that the violation was "repeated" within the meaning of 29 U.S.C. 666(a), which authorizes assessment of increased penalties for such violations. The Secretary proposed a penalty of $1,560. Petitioner contested the citation, and the matter was submitted to an administrative law judge of the Occupational Safety and Health Review Commission on stipulated facts (Pet. App. 12-13). In the stipulation (Pet. App. 13-15), petitioner admitted that the violation had occurred but denied that it was "repeated." The Secretary thereafter reduced his proposed penalty to $780, and the parties agreed that $200 would be an appropriate penalty if the judge were to find that the violation was not a "repeated" one. See 29 U.S.C. 666(c), (j).

The administrative law judge found a "repeated" violation. He concluded that the existence of the same tripping hazards created by the same types of material, hoses and welding leads, during work performed at the same repair facility by the same labor crafts under the

same management supervision in admitted violation of the same safety standard was sufficient evidence to justify the classification of the violation as "repeated," despite the lapse of time between inspections (Pet. App. 16-17). In the judge's view, the fact that the violation occurred under the same management supervision gave rise to an inference, unrebutted by petitioner, that petitioner had not taken sufficient measures to prevent a repetition of conduct known to be in violation of the Act (*id.* at 17). However, the judge reduced the proposed penalty to $400 in a decision dated April 12, 1976 (*id.* at 18-19).

Pursuant to 29 U.S.C. 661(i), Commissioner Moran of the Occupational Safety and Health Review Commission directed review of the administrative law judge's decision on April 15, 1976, before either party had requested review. Both petitioner and the Secretary of Labor then petitioned for review. Petitioner contested the finding of a "repeated" violation, and the Secretary contested the reduction of the penalty assessment. Commissioner Cleary granted the petitions of both parties on May 12, 1976. The term of Commissioner Moran expired on April 27, 1977, before the Commission issued a decision in the case. This vacancy remained unfilled until May 1, 1978.

On January 11, 1978, the Commission, reduced to two members, disposed of this case. The two Commissioners agreed that a violation had occurred and that a $200 penalty was appropriate, and they jointly rejected several statutory objections to the citation and declined to reach certain constitutional objections (Pet. App. 7, 10-11). The Commissioners disagreed, however, on whether the violation was properly classified as "repeated" (*id.* at 7-11). To resolve their impasse on this question, the Commissioners agreed to affirm the administrative law judge's decision that the violation was "repeated," but to

accord it the precedential value of an administrative law judge's decision that the Commission had declined to review (*id.* at 7, 11).

Petitioner sought judicial review of this order in the court of appeals pursuant to 29 U.S.C. 660(a). The court dismissed the petition for review for lack of jurisdiction, concluding that the Commission's order affirming the decision of the administrative law judge was not a reviewable "official action" by the Commission within the meaning of 29 U.S.C. 661(e)[1] because the Commissioners did not, in fact, agree on whether the violation was "repeated" (Pet. App. 3-4). The court largely relied on its previous decision in *Cox Brothers, Inc.* v. *Secretary of Labor*, 574 F. 2d 465 (9th Cir. 1978), in which it had concluded that an affirmance of an administrative law judge's decision by an equally divided vote of two Commissioners was not "official action" under Section 661(e) because the requisite two Commissioners did not join in the disposition. The court rejected the argument that the present case was distinguishable from *Cox Brothers* because both members here had voted to affirm (albeit without according the affirmance the precedential weight of a Commission decision), whereas in *Cox Brothers* only one of the two members of the "equally divided" Commission had actually voted to sustain the administrative law

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[1] 29 U.S.C. 661(e) provides:

> For the purpose of carrying out its functions under this chapter, two members of the Commission shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members.

judge's decision. The court remarked (Pet. App. 4; emphasis in original):

> The Commission cannot have it both ways. Either it affirms the hearing officer's decision and the Commission's ruling has the precedential value of a *Commission ruling*, or the Commission has not officially affirmed the hearing officer's decision. In both *Cox Brothers* and this case, the hearing officer's decision is left as the only authoritative disposition.

Because the court of appeals dismissed the petition for lack of jurisdiction, it did not address the question whether the violation in this case was "repeated" within the meaning of 29 U.S.C. 666(a).

ARGUMENT

1. As petitioner points out (Pet. 5), there is a conflict among the circuits as to whether a court of appeals has jurisdiction to review a decision of the Occupational Safety and Health Review Commission that results from a split vote of two Commissioners affirming a decision by an administrative law judge. In addition to the decisions by the Ninth Circuit in the present case and in *Cox Brothers*, the Fifth Circuit has held that an affirmance by the equally divided vote of a two-member quorum does not constitute "official action" of the Commission giving rise to a reviewable order. *Shaw Construction, Inc.* v. *OSHRC*, 534 F. 2d 1183, 1185-1186 (1976). The Fourth Circuit has rejected this reasoning in the context of a three-way split and a two-way split of the Commission members. *Bristol Steel & Iron Works, Inc.* v. *OSHRC*, 601 F. 2d 717, 720 n.7 (1979); *George Hyman Construction Co.* v. *OSHRC*, 582 F. 2d 834 (1978). In addition, the Second, Third, Sixth, Seventh and Eighth Circuits have reviewed orders affirmed by a one-to-one vote of the Commission without questioning their finality or validity.

See *Schriber Sheet Metal & Roofers, Inc.* v. *OSHRC*, 1977-1978 Occup. Safety & Health Dec. (CCH) para. 22,423 (1977), vacated on other grounds, 597 F. 2d 78 (6th Cir. 1979); *Marshall* v. *L. E. Myers Co.*, 589 F. 2d 270 (7th Cir. 1978); *Bethlehem Steel Corp.* v. *OSHRC*, 573 F. 2d 157 (3d Cir. 1978); *Olin Construction Co.* v. *OSHRC*, 1974-1975 Occup. Safety & Health Dec. (CCH) para. 19,853 (1975), affirmed, 538 F. 2d 312 (2d Cir. 1976); (table) *United States Steel Corp.* v. *OSHRC*, 537 F. 2d 780 (3d Cir. 1976); *Ames Crane & Rental Service, Inc.* v. *Dunlop*, 532 F. 2d 123 (8th Cir. 1976).

Whatever the proper resolution of this conflict in a case involving an affirmance by an equally divided vote, we believe that the court of appeals erred on the facts of this case. Although Commissioners Cleary and Barnako held differing views on whether petitioner's violation was "repeated," the Commission's formal order, in which both Commissioners joined, unequivocally affirmed the holding of the administrative law judge that the violation was repeated and imposed a penalty of $200 (Pet. App. 11). In our view, this order plainly qualifies as "official action," taken "on the affirmative vote of * * * two members" of the Commission (29 U.S.C. 661(e)), even though the two members agreed to accord the decision the precedential value only of an unreviewed decision by an administrative law judge (Pet. App. 7). Hence, the order was reviewable in the court of appeals under 29 U.S.C. 660(a).

The court below improperly looked behind the Commission's order, which was valid on its face, in determining that "the 'dissenting' commissioner did not truly vote to affirm" (Pet. App. 5). Cf. *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945) (the role of an appellate court "is to correct wrong judgments, not to revise opinions").

It is entirely appropriate for a member of an independent regulatory commission to vote in a certain way solely to avoid an impasse. *Public Service Commission* v. *FPC*, 543 F. 2d 757, 777 (D.C. Cir. 1974); cf. *Screws* v. *United States*, 325 U.S. 91, 134 (1945) (Rutledge, J., concurring). Furthermore, the Commission had the discretion to determine, as have the courts of appeals for the Ninth and several other circuits,[2] that its affirmance, while binding on the parties to this case, would have no precedential value in future cases.

Despite our conclusion that the decision below is incorrect, we do not believe that the jurisdictional issue warrants review by the Court at this time. As noted above, the vacancy that gave rise to the problem in this case was filled in May of 1978, and the Commission since then has had its full complement of three members.[3] Because this problem may recur in the future, the Commission is now exploring ways to dispose equitably of cases in which the votes of individual Commissioners are equally divided. Moreover, in view of the court of appeals' decision, the Commission, now comprised of

[2]See, *e.g.*, 1st Cir. R. 14 and Appendix B; 2d Cir. R. 0.23; 7th Cir. R. 35; 9th Cir. R. 21(c).

[3]The Commission informs us that its research has disclosed that approximately 18 cases were decided by a split vote of the two Commissioners during the period of the vacancy involved in this case, and 32 were decided during a prior vacancy in 1975-1976. Review was sought in the courts of appeals in approximately 20 of these 50 cases. The Ninth Circuit dismissed three of these cases (including the instant case and *Cox Brothers*), and the Commission has not taken any further action on them. Review was sought in the Fifth Circuit in two cases, including *Shaw Construction, Inc., supra*. The Commission subsequently disposed of *Shaw Construction, Inc.* by a 2-0 vote, but no action has been taken on the other Fifth Circuit case.

three members, intends to take appropriate "official action" in this case.

Because the court of appeals dismissed for lack of jurisdiction, it did not reach the merits of whether petitioner's violation was a "repeated" one under 29 U.S.C. 666(a). Without the benefit of the views of the full Commission or the court of appeals, this issue plainly does not warrant review by the Court at this stage of the proceedings.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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